STATE OF MICHIGAN
IN THE SUPREME COURT

People of the State of Michigan,

Plaintiff-Appellant,

v

Tia Marie-Mitchell Skinner,

Defendant-Appellee.

St. Clair County CC: 10-2936-FC
COA: 317992
SC: 152448

AMICUS CURIAE BRIEF OF THE FAIR PUNISHMENT PROJECT

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INTEREST OF AMICUS CURIAE

The Fair Punishment Project ("FPP") is a joint project of the Charles Hamilton Houston Institute for Race and Justice and the Criminal Justice Institute, both at Harvard Law School. FPP's mission is to address the ways in which our laws and criminal justice system contribute to excessive punishment. FPP believes that punishment can be carried out in a way that holds those who commit crimes accountable and keeps communities safe, while still affirming the inherent dignity that all people possess. To that end, FPP conducts research and advocacy and works with stakeholders to seek meaningful, consensus-driven criminal justice reform. As part of its advocacy mission, FPP has submitted briefs as *amicus curiae* to courts across the nation, providing its perspective on emerging issues in criminal law and procedure.

I. INTRODUCTION

Tia Marie-Mitchell Skinner challenges the constitutionality of her sentence to life without parole for an offense she committed as a juvenile, arguing that MCL 769.25 violates her right under the Sixth Amendment to have a jury find those facts necessary to impose a life sentence. FPP agrees.

The U.S. Supreme Court has recognized that imposing a sentence of life without parole on a juvenile violates the Eighth Amendment's prohibition again cruel and unusual punishment "for all but the rare juvenile offender whose crime reflects irreparable corruption." *Montgomery v Louisiana*, ___ US ___; 136 S Ct 718, 734; 193 L Ed 2d 599 (2016), quoting *Miller v Alabama*, 567 US 460, 479-80; 132 S Ct 2455; 183 L Ed 2d 407 (2012) (internal quotation marks omitted). "Irreparable corruption" is a substantive standard, and to determine whether a child fits within its narrow confines, a fact-finder must first consider the mitigating value of "youth and its attendant characteristics." *Id*. at 735, quoting *Miller*, 567 US at 465.

The Sixth Amendment's right to a trial by jury right serves a critical role in Michigan in determining whether the extremely high and demanding "irreparably corrupted" threshold has been satisfied. In cases where a child faces a possible death-in-prison sentence, twelve citizens who speak with the voice and moral authority of the community are better suited than a judge to protect against the risk of excessive punishment. Juries are better positioned than judges both to conduct the factual analysis of a defendant's character and development, and to protect against the risk that racial bias might influence the decision to impose a juvenile life-without-parole ("JLWOP") sentence.[1]

[1] This brief does not address other potential constitutional infirmities in Michigan's JLWOP statutory scheme. In particular, the Eighth Amendment likely requires that any determination of "irreparable corruption" in a child, whether made by judge or jury, be reassessed several years

II. ARGUMENT

A. A Jury Finding of Irreparable Corruption Is Necessary To Protect Against Excessive Punishment

The Supreme Court has made clear that sentencing a child to spend the rest of her life in prison is an extreme form of punishment that "reflects 'an irrevocable judgment about [an offender's] value and place in society,' at odds with a child's capacity for change." *Miller*, 567 US at 473, quoting *Graham v Florida*, 560 US 48, 74; 130 S Ct 2011; 176 L Ed 2d 825 (2010). As a result, this punishment is permissible only in those extremely rare instances when a factfinder determines that a crime committed by a child reflects the child's "irreparable corruption," rather than "transient immaturity." *Montgomery*, 136 S Ct at 734 (2016), quoting *Miller*, 567 US at 479-80 (internal quotation marks omitted). Making a reliable, unbiased factual determination about a defendant's character is therefore of constitutional significance: sentencing a child who is not found to be irreparably corrupt to die in prison violates the Eighth Amendment.

The U.S. Supreme Court has not addressed whether a judge or jury should determine "irreparable corruption," but there are a number of factors that militate in favor of allowing a jury, rather than a judge, to make that determination. First, a jury, as the conscience of the community, plays an essential role in finding facts that expose a child to a death-in-prison sentence. Second, juries are well positioned to make an individualized assessment of a defendant's character and development, as required under the Eighth Amendment, because jurors

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after the offense, at which time the individual's brain development and identity formation are more complete and a more reliable assessment of her character and culpability can be made. See Brief of the Fair Punishment Project as Amicus Curiae, *State v Zuber*, 227 NJ 422; 152 A 3d 197 (2017); see also *Zuber*, 227 NJ at 452 (recognizing "serious constitutional issues about whether sentences for crimes committed by juveniles, which carry substantial periods of parole ineligibility, must be reviewed at a later date").

bring a variety of viewpoints and experiences to their service. Third, juries mitigate the risk that racial bias influences the decision to impose a juvenile life-without-parole sentence.

1. Juries Express the Conscience of the Community in the Imposition of the Harshest Sentences, Including Juvenile Life Without Parole

Juries express the conscience of the community and therefore should play a role when society imposes the harshest punishment that may be constitutionally imposed on a child: condemning her to live and die in prison.

The U.S. Supreme Court has acknowledged the importance of the jury right in a context analogous to JLWOP: the death penalty. In *Ring v. Arizona*, 536 US 584; 122 S Ct 2428; 153 L Ed 2d 556 (2002), and *Hurst v Florida*, ___ US ___; 136 S Ct 616; 193 L Ed 2d 504 (2016), the U.S. Supreme Court held that a jury must find any facts that are necessary for a court to sentence a defendant to death. See *Ring*, 536 US at 609 ("The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death.").

In the JLWOP context, the "irreparable corruption" standard operates the same way as the aggravating factors at issue in *Ring* and *Hurst*: it is a threshold determination that must be made before a defendant is eligible for a harsher sentence. In the death penalty context, the Eighth Amendment requires the finding of at least one aggravating factor before sentencing a defendant to death, see, e.g. *Gregg v Georgia*, 428 US 153, 206; 96 S Ct 2909; 49 L Ed 2d 859 (1976); as a result, the Sixth Amendment requires the aggravating factor to be found by a jury. See *Ring*, 536 US at 609. Likewise, under *Miller*, the Eighth Amendment requires a finding of "irreparable corruption" before sentencing a juvenile defendant to die in prison. The Sixth Amendment therefore requires this finding to be made by a jury.

Several Justices have gone beyond the majority's analyses in *Ring* and *Hurst* to suggest that in the context of the death penalty—the most severe penalty that the state can impose on an adult—the right to a jury trial has particular importance. Justice Scalia, concurring but writing separately in *Ring*, expressed concern that the "accelerating propensity of both state and federal legislatures to adopt 'sentencing factors' determined by judges that increase punishment beyond what is authorized by the jury's verdict" has eroded "our people's traditional belief in the right of trial by jury is in perilous decline." *Ring*, 536 US at 611-612 (Scalia, J., concurring). He went on to explain:

> That decline is bound to be confirmed, and indeed accelerated, by the repeated spectacle of a man's going to his death because a judge found that an aggravating factor existed. We cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it.

Id. at 612.

Other Justices have expressed a similar concern, though lodged in the context of the Eighth Amendment. Justices Sotomayor, Breyer, and Stevens have all argued that the Eighth Amendment requires the death penalty to be imposed by a jury. *See Woodward v Alabama*, ___ US ___; 134 S Ct 405, 406; 187 L Ed 2d 449 (2013) (Sotomayor, J., dissenting from denial of certiorari) ("This Court has long acknowledged that death is fundamentally different in kind from any other punishment. For that reason, we have required States to apply special procedural safeguards to minimize the risk of wholly arbitrary and capricious action in imposing the death penalty. One such safeguard, as determined by the vast majority of States, is that a jury, and not a judge, should impose any sentence of death.") (citations and internal quotation marks omitted); *Ring*, 536 US at 614 (Breyer, J., concurring in judgment); *Harris v Alabama*, 513 US 504, 515-25; 115 S Ct 1031; 130 L Ed 2d 1004 (1995) (Stevens, J., dissenting); *Spaziano v Florida*, 468

US 447, 467-90; 104 S Ct 3154; 82 L Ed 2d 340 (1984) (Stevens, J., joined by Brennan and Marshall, JJ., concurring in part and dissenting in part). These Justices frame the issue as a moral one: that the jury should "express the conscience of the community on the ultimate question of life or death." *Woodward*, 134 S Ct at 407 n 2 (Sotomayor, J., dissenting from denial of certiorari), quoting *Witherspoon v Illinois*, 391 US 510, 519; 88 S Ct 1770; 20 L Ed 2d 776 (1968).

The common concern expressed by these Justices is that the role of the jury is fundamental to the legitimacy of any death sentence imposed by the state. Their analysis and reasoning applies with equal force to any sentence of life without parole imposed on a child, which represents an "irrevocable judgment" about a child's "value and place in society." *Miller*, 567 US at 473. Indeed, the Supreme Court's jurisprudence on JLWOP has borrowed directly from the Court's reasoning with respect to the death penalty insofar as both require an individualized determination of the defendant's characteristics prior to imposing a sentence that permanently extinguishes an individuals' public life and freedom. *Miller* explained that the Court's decision in *Graham*, which categorically barred JLWOP sentences for children convicted of non-homicide offenses, "likened life without parole for juveniles to the death penalty itself, thereby evoking" a line of cases in which the Court "prohibited mandatory imposition of capital punishment, requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death." *Miller*, 567 US at 470. *Miller* explained that these cases require "that capital defendants have an opportunity to advance, and the judge or jury a chance to assess, any mitigating factors, so that the death penalty is reserved only for the most culpable defendants committing the most serious offenses." *Id.* at 475-76.

In both the death penalty and JLWOP contexts, the gravity of the sentence, and individualized determination of culpability required under the Eighth Amendment, make it essential that the jury, as the voice of the community, play a role in handing down such judgments.

2. Assessing a Child's Character and Development under the *Miller* Factors Falls within the Traditional Role of the Jury in the Imposition of Society's Most Serious Punishments

In *Miller*, the Supreme Court stressed that children have a "diminished culpability and greater prospects for reform" than adults. *Miller*, 567 US at 471. The Court explained that these differences are exhibited in at least three ways: (1) a "lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking"; (2) increased vulnerability to "negative influences and outside pressures, including from their family and peers"; and "limited control over their own environment and lack of the ability to extricate themselves" from dangerous settings; and (3) a character that is not as "well formed as an adult's" and traits that are "less fixed" such that actions are "less likely to be evidence of irretrievable depravity." *Id.* at 471, quoting *Roper v Simmons*, 543 US 551, 570; 152 S Ct 1183; 161 L Ed 2d 1 (2005)) (internal quotation marks omitted).

Analysis and evaluation of these factors in the context of an individual defendant calls for the factfinder to consider the facts presented and assess the defendant's character, development, and capacity for change. Such assessments are properly the province of a jury of the defendant's peers. Juries are likely to be representative of the community in ways that inform their judgment of a defendant's character and development. Juries bring people "from different walks of life . . . into the jury box" and thereby ensure that "a variety of different experiences, feelings, intuitions and habits" are applied to the case. *United States ex rel Toth v Quarles*, 350 US 11, 18; 76 S Ct 1; 100 L Ed 8 (1955). A jury's deliberations incorporate "community standards,

common sense, and human emotion that can be lost otherwise in a legal proceeding." Sandra M. Ko, *Why Do They Continue to Get the Worst of Both Worlds? The Case for Providing Louisiana's Juveniles with the Right to a Jury in Delinquency Adjudications*, 12 Am U J Gender Soc Pol'y & L 161 (2004), citing Korine L. Larsen, Comment, *With Liberty and Juvenile Justice for All: Extending the Right to a Jury Trial to the Juvenile Courts*, 20 Wm Mitchell L Rev 835, 860 (1994)). Jurors' life experiences are likely to help them evaluate whether someone is among the very limited and rare group of people who are truly irreparably corrupt or whether, to the contrary, that person has committed a grave wrong but still maintains the capacity for growth, development, maturation, learning, and change.

Indeed, our justice system entrusts juries with similar factual determinations in the context of the death penalty, in which juries routinely consider complex aggravating and mitigating factors. *See Ring*, 536 US at 607-608 (2002) ("[T]he superiority of judicial factfinding in capital cases is far from evident . . . [T]he great majority of States responded to this Court's Eighth Amendment decisions requiring the presence of aggravating circumstances in capital cases by entrusting those determinations to the jury."). These aggravating and mitigating factors are every bit as complex—and rooted in a defendant's character—as those required to be assessed under *Miller*. See, e.g., Arizona Rev Stat § 13-751 (including among the aggravating factors considered by juries in Arizona whether the "defendant committed the offense in an especially heinous, cruel or depraved manner" and whether the "offense was committed in a cold, calculated manner without pretense of moral or legal justification"); Cal Penal Code § 190.2 (including as an aggravating factor whether the "murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity"); Ohio Rev Code § 2929.04(B) (including among mitigating factors, "the nature and circumstances of the offense, the history, character,

and background of the offender," the "youth of the offender," and "[a]ny other factors that are relevant to the issue of whether the offender should be sentenced to death").

As Justice Stevens has explained, assessing a defendant's character and determining whether she should be subject to the death penalty has been the province of the jury since the nation's founding. See *Walton v Arizona*, 497 US 639, 710-711; 110 S Ct 3047; 111 L Ed 2d 511 (1990) (Stevens, J., dissenting) ("Throughout its history, the jury determined which homicide defendants would be subject to capital punishment by making factual determinations, many of which related to difficult assessments of the defendant's state of mind. By the time the Bill of Rights was adopted, the jury's right to make these determinations was unquestioned."), quoting Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial*, 65 Notre Dame L Rev 1, 10-11 (1989).

3. Social Science Illustrates Why Juries Are Better Positioned To Assess a Juvenile's Moral Culpability

Social science supports the idea that juries are more likely than individual judges to accurately assess the facts necessary to gauge a person's moral culpability. Social scientists have studied the group decision-making employed by juries and found that "the give-and-take of a discussion format promotes accuracy and good judgment by ensuring that competing viewpoints are aired and vetted." Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 Wake Forest L Rev 553, 578-79 (1998). Studies of decision-making by juries and other groups show that "group members commonly reconsider and change even the firmest of prejudgments as they come to appreciate the complexities of a subject and take heed of viewpoints which they initially did not recognize or sufficiently value." *Id*. Moreover, because bias is often unintentional or unconscious, "[s]uch biases are most likely to be uncovered—and corrected—by means of an interchange between

individuals with conflicting perspectives, such as what typically occurs during a jury deliberation." *Id.* at 577.

Juries may be particularly useful in avoiding excessive punishment in the sentencing of youth, because juries can help "bridge[] the demographic and cultural gap between a judge and a minor." Ko, *supra* at 15, citing Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 NC L Rev 1083, 1125 (1991)). Jurors, who have observed the challenges faced by children in their community and have witnessed the development and maturation of these children into adults, are more likely to make a nuanced and reliable assessment of whether a particular defendant is the "rare juvenile offender" who is irredeemable. On the other hand, a trial judge, whose familiarity with the youth of a particular community is limited to his courtroom experience with those accused of crimes, may not fully appreciate the extent to which a child's actions may stem from youthful immaturity and may miss the child's prospects for reform.

Importantly, the heightened reliability of jury determinations are important not only for the assessment of factors such as youth and its characteristics, but also for avoiding the risk that racial bias influences the irreparable corruption finding. Evidence shows that youth of color, and African-Americans in particular, are sentenced to life in prison without parole at a disproportionately high rate. See Ashley Nellis, The Sentencing Project, *The Lives of Juvenile Lifers: Findings from a National Survey* 8 (2012) (finding that 75.1% of juveniles serving life without parole sentences were minorities and 60% were black). Overall, "[j]udges impose LWOP sentences on black juveniles at a rate about ten times greater than they do white youths, and Blacks comprise a substantial majority of all youths serving LWOP sentences." Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 JL

& Fam Stud 11, 70 (2007), citing Human Rights Watch & Amnesty International, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* 27-28 (2005); see also John Mills et al., *Juvenile Life Without Parole in Law and Practice: The End of Superpredator Era Sentencing*, 65 Am U L Rev 535, 586 (2016) (examining homicide arrests and JLWOP sentencing from 1980 to 2013 and concluding that "African American juvenile offenders are sentenced to JLWOP at almost twice the rate of white juvenile offenders per homicide arrest"); Deborah LaBelle & Anlyn Addis, *Basic Decency: Protecting the Human Rights of Children* (2012) (finding that youth of color comprised 29% of Michigan's youth population but made up 73% of those serving life sentences they received as juveniles).[2] Requiring a jury to conduct the factfinding necessary to make a determination of "irreparable corruption" would not eradicate unjustified disparities in juvenile life without parole sentencing, but there is reason to believe it could help.

III. CONCLUSION

The Sixth Amendment jury right is of particular importance in cases where a child faces life in prison without parole. Juries, as representatives of the community, have an essential role to play in ensuring that the government imposes this harsh punishment on a child only under the exceedingly narrow circumstances in which it is permitted under the Eighth Amendment. Moreover, juries, rather than judges, are best positioned to conduct the fact-based assessment of

[2] In some areas within Michigan, the statistics are even starker. For example, African-Americans make up 39% of the population of Wayne County, but more than 90% of the individuals serving juvenile life without parole sentences from the county are black. Defendants from Wayne County also make up a disproportionate share of those serving juvenile life without parole sentences statewide: the county has just 18% of the statewide population, yet it accounts for at least 40% of these harsh sentences. Fair Punishment Project, *Juvenile Life Without Parole In Wayne County: Time to Join the Growing National Consensus?* (2016); see also Mills et al., *Juvenile Life Without Parole*, 65 Am U L Rev at 573 (recognizing that from 2006 to 2015, Wayne County accounted for 4% of all JLWOP sentences nationwide, second only to Los Angeles County).

defendants' character and development called for by *Miller*. In addition, juries are a potential tool to combat the risk of racial bias in JLWOP sentencing in Michigan and across the country. Accordingly, the Court should hold that juries must resolve the factual question of whether a child has exhibited "irreparable corruption" before that child can be sentenced to spend the rest of her life in prison.

Dated: June 16, 2017

Respectfully submitted,

/s/ Robert M. Riley

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CERTIFICATE OF SERVICE

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I hereby certify that on Friday, June 16, 2017, I electronically filed the Fair Punishment Project's *Amicus Curiae* Brief, along with the Certificate of Service, using the TrueFiling System which will send notification of such filing to all registered counsel of record.

/s/ Robert M. Riley

Dated: June 16, 2017 Robert M. Riley (P72290)

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